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No. 91-1039

**In The**
**Supreme Court of the United States**
**October Term, 1991**

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WALTER FULLER AIRCRAFT SALES, INC.,

*Petitioner,*

versus

FAYSOUND LIMITED,

*Respondent.*

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**Petition For A Writ Of Certiorari**
**To The United States Court of Appeals**
**For The Eighth Circuit**

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# REPLY BRIEF

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# REPLY BRIEF

Petitioner Walter Fuller Aircraft Sales, Inc. files this Reply Brief pursuant to Supreme Court Rule 15.6.

1. In its Brief in Opposition to the Petition for a Writ of Certiorari, Respondent has admitted that the Eighth Circuit

> would have been in conflict with the Federal Rules of Appellate Procedure and decisions of this Court . . . if it had held that a real notice of appeal should designate an order on a post judgment motion with which the appellant agreed, rather

> than the judgment itself, with which the appellant disagreed.

Respondent's Brief in Opposition at 6 (emphasis added). However, this is exactly what the Eighth Circuit found. According to the Eighth Circuit,

> Looking past the fact that Fuller's supposed notices were filed in the wrong court, and reading those papers generously, Fuller's pleadings are still insufficient: they do not specify correctly the judgment being appealed from. All the various documents specify instead the District Court's October order, the original judgment, and not the final judgment entered on January 22, 1991, with the denial of Falcon Jet's post judgment motion.

*Faysound Ltd. v. Falcon Jet Corp.*, 940 F.2d 339, 342 (8th Cir. 1991) (emphasis added). This finding is in error and must be corrected.

2. Respondent maintains that the basis for the Eighth Circuit's holding in the decision to be reviewed above was that

> [t]he only sensible meaning of Fed. R. App. P. 4(a)(1) is that the document filed must be a genuine notice of appeal, so entitled, and not a document intended for another purpose in the court of appeals.

Respondent's Brief in Opposition, p. 7. To the contrary, as this Court recently stated, it is the notice afforded by a document, not the document's title or the litigant's motivation in filing it, which determines a document's sufficiency as a notice of appeal. *Smith v. Barry*, ___ U.S. ___, 60 U.S.L.W. 4065, 4067 (1992).

3. Respondent, in its Supplemental Brief, has attempted to distinguish the *Barry* decision as a "unique circumstances" case. This assertion is erroneous; the *Barry* decision does not rely on "unique circumstances" and stands completely outside the doctrine.

In *Barry*, this Court held that an informally filed brief could be a proper notice of appeal. In contrast, the doctrine of "unique circumstances" is found "only where a party has performed an act, which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that the act has been properly done." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989)(emphasis added). Thus, the "unique circumstances" doctrine is a judicially created exception to the Federal Rules of Appellate Procedure. However, the *Barry* decision did not rely on an exception to the Rules; rather, this Court found that the appellant had met the requirements of the Rules themselves and had filed his appeal within the correct deadline. *Barry*, 60 U.S.L.W. at 4067.

Faysound's argument to the effect that Petitioner's papers did not constitute a "real notice of appeal" is contrary to this Court's holding in *Smith v. Barry*.

## CONCLUSION

Petitioner urges that its petition be granted and that this case be reversed for the reasons stated herein and in the Petition for a Writ of Certiorari.

Respectfully submitted,

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